STATE OF NORTH CAROLINA **COUNTY OF WAKE**	**IN THE OFFICE OF ADMINISTRATIVE HEARINGS** **07 EDC 2004**

Student by parents, *Mother and Father*, Petitioners, v. BOARD OF EDUCATION OF WAKE COUNTY, Respondent.	)	**FINAL DECISION BY SUMMARY JUDGMENT**

THIS MATTER comes before the undersigned Administrative Law Judge on Respondent's Motion for Summary Judgment. Respondent filed a Memorandum of Law in Support of Respondent's Motion for Summary Judgment. A pre-hearing conference and motions hearing was held in person in accord with a previous Order in this matter. Also considered was a Status Update filed by Respondent in regard to a previous Order of this tribunal, Objections to Proposed Findings of Facts and Conclusions of Law filed by Petitioners, and all other matters in the record. After hearing arguments from counsel for both parties, taking full consideration of all arguments presented in Respondent's Motion and Memorandum of Law and/or other documents in support of or in response to the Motion, the Undersigned is of the opinion that a Final Decision by Summary Judgment is appropriate and hereby makes the following Findings of Fact and Conclusions of Law.

STANDARD OF REVIEW

"Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [a] party is entitled to a judgment as a matter of law.' " *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003), *citing* N.C. R.Civ Pro. 56(c). A court ruling on a motion for summary judgment must view all the evidence in the light most favorable to the non-movant. *Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992). The moving party bears the initial burden of identifying "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In addition to presenting evidence affirmatively on a material issue, the movant may also satisfy this burden by pointing out "an absence of evidence to support the nonmoving party's case." *Celotex Corp.*, 477 U.S. at 325.

Once the moving party presents an adequately supported motion, the opposing party must come forward with specific facts, not mere allegations or speculation that controvert the facts set forth in the movant's evidentiary forecast. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63-64, 414 S.E.2d 339, 342 (1992); *Moore v. Fieldcrest Mills*, 36 N.C. App. 350, 353, 244 S.E.2d 208, 210 (1978), *aff'd*, 296 N.C. 467, 251 S.E.2d 419 (1979). "The real purpose of summary judgment is to go behind or pierce the pleadings to determine if a case has any merit." *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972). As the North Carolina Supreme Court has said:

> The purpose of summary judgment can be summarized as being a device to bring litigation to an early decision on the merits without the delay and expense of a trial where it can be readily demonstrated that no material facts are in issue. Two types of cases are involved: a) Those where a claim or defense is utterly baseless in fact, and b) those where only a question of law on the indisputable facts is in controversy and it can be appropriately decided without full exposure of trial.

Kessing v. National Mortgage Corporation, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971).

FINDINGS OF FACT

1. Respondent Wake County Board of Education is a local education agency (LEA) receiving funds under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, (IDEA) and was responsible for providing special education to *Student* pursuant to Article 9, Chapter 115C, of the General Statutes, when *Student* was enrolled in the Wake County Public Schools.

2. Petitioner *Student* was a student in the Wake County Public School System (WCPSS). Until November 16, 2007, *Student* was enrolled in the seventh grade at W.F. Middle School, where he received special education services pursuant to 20 U.S.C. § 1415 *et. seq.*, the Individuals with Disabilities Education Act (IDEA).

3. On November 1, 2007, *Student*'s principal suspended *Student* for ten days with a recommendation for long-term suspension for the remainder of the school year and set a manifestation determination hearing in the time allowed by law. Prior to this meeting, the District Superintendent rejected the long-term suspension recommendation of the principal and let the ten-day suspension stand as *Student*'s only suspension time. He did reassign *Student* to another school in the district for the remainder of the school year.

4. Petitioners appealed the reassignment decision to the Wake County Board of Education, where Petitioners were represented by counsel. Their appeal was denied and *Student* remained assigned to the new school.

5. Since his suspension on November 1, 2007, *Student* has not returned to the Wake County Public School System. Petitioners assert that *Student* has received educational services through their home school program.

6. On November 15, 2007, *Mother and Father*, on behalf of their son *Student*, filed a Petition for Contested Case Hearing. In an Order dated December 17, 2007, the Undersigned held the Petitioners failed to meet the requirements of Paragraph (b) of Section 300.508 of the Individuals with Disabilities Education Act and declared the Petition insufficient. Specifically, the Undersigned found that Petitioners failed to describe the nature of the problem(s) and facts relating to the problem(s) with sufficient clarity, as well as failed to propose sufficient or adequate resolutions to those problem(s).

7. Petitioners were granted permission to file an amended petition, with instruction that the amended petition should provide more definite and specific statements regarding the nature of the dispute(s) including specific dates, facts supporting those allegations and proposed resolution of each of the specific problem(s) identified.

8. On January 18, 2008, Petitioners filed an Amended Petition asserting that *Student*'s rights under the IDEA were violated when the Board allegedly:

   a. failed to implement a Behavior Intervention Plan (BIP) for the 2007-2008 school year;
   b. failed to provide escort services as outlined in *Student*'s BIP on two occasions when *Student* was involved in disciplinary incidents;
   c. refused to permit either *Mother* or *Father* to be present when *Student* was questioned about those disciplinary incidents; and
   d. failed to conduct a manifestation determination review (MDR) after the second disciplinary incident.

9. Petitioners alleged that these failures deprived *Student* of a free, appropriate, public education (FAPE). For these failings, Petitioners requested the following remedies:

   a. that *Student* be home schooled while the Petition is resolved and for Respondent to provide assistance with that program;
   b. that *Student* be awarded five years of prospective tuition at an unidentified private school beginning with the 2008-2009 school year, including transportation costs to and from school;
   c. that a copy of *Student*'s educational records with a list of all individuals who have sought access to his file be provided to them;
   d. that all disciplinary actions taken against *Student* be reversed;
   e. that all referrals to Juvenile Justice be withdrawn; and
   f. that they be awarded attorneys' fees.

10. On March 4, 2008, a motions hearing was held on Respondent's Partial Motion to Dismiss. This Tribunal heard arguments by counsel for both parties and counsel for

Petitioners clarified that Petitioners were seeking compensation for the cost of the home school program as well as reimbursement for future private schooling.

11. In an Order dated March 12, this tribunal dismissed Petitioners' claim related to the Board's alleged failure to hold a manifestation determination review for *Student*. *Student* did not receive an out-of-school suspension greater than ten days or a series of short-term suspensions that resulted in a change of placement.

12. Both parties have been actively engaged in discovery. The Board served its First Set of Interrogatories and Request for Production of Documents on February 8, 2008 and Petitioners responded to this on February 23. On March 3 and 4, 2008, Petitioners served on the Board their First and Second Sets of Request for Admissions, Interrogatories, and Requests for Production of Documents and the Board submitted its responses on March 17 and 19, respectively.

13. On March 6 and 7, 2008, Petitioners deposed three school employees: 1) *Ms. M.B.*, Assistant Principal, W.F. Middle School; 2) *Mr. P.N.*, Behavior Support Teacher, W.F. Middle School; and 3) *Ms. E.H.*, Principal, W.F. Middle School. On April 23, 2008, Petitioners deposed two additional school employees: 1) *Ms. S.W.*, Senior Administrator, Wake County Public Schools; and 2) *Superintendent D.B.*, Superintendent, Wake County Public Schools.

14. On March 27, 2008, Respondent took the depositions of *Mother and Father*.

15. Respondent scheduled the deposition of Allie Plute, Director of Sylvan Learning Center in Wake Forest, North Carolina. In Petitioners' February, 2008 Response to Petitioners' First Set of Interrogatories and Request for Production of Documents, Petitioners identified Ms. Plute as an expert witness. To accommodate counsel for Petitioners, the deposition of Ms. Plute was scheduled for April 24, 2008.

16. On April 23, 2008 at the depositions of *Ms. S.W.* and *Superintendent D.B.*, the parties orally confirmed the deposition of Ms. Plute the following day for 2:00 pm. On the 24th, Petitioners did not appear for Ms. Plute's deposition. At 2:20 pm, Petitioner's counsel notified Respondent that Petitioners would not be attending because they had decided they would not be calling Ms. Plute as either an expert witness or witness of any kind at the hearing. In a May 2, 2008 Motion for Sanctions, Respondent sought an order compelling Petitioners to pay deposition costs including attorneys' fees.

17. Under a Memorandum of Understanding between the North Carolina State Board of Education, through the Department of Public Instruction, Exceptional Children Division and the North Carolina Office of Administrative Hearings, the Office of Administrative Hearings (OAH) agreed that the Administrative Law Judges (ALJs) will not utilize the following practices in special education due process hearings: impose monetary sanctions; award attorneys fees. As a consequence of the Memorandum of

Understanding, Petitioners were given the sanction of not being able to call Ms. Plute as a witness at the hearing.

18. The Board served its first written discovery on February 8, 2008. The interrogatories sought information about the nature of *Student*'s home school program, the expenses incurred in providing that program, and the name of the private school in which *Mother and Father* intended to enroll *Student* The interrogatories also required Petitioners to state whether they had applied for admission to the school in which they intended to enroll *Student*, whether he had been admitted, and to describe the program offered at the school. The Board's request for production of documents included a request that Petitioners provide "[e]very document identified in or which supports" their responses to the interrogatories seeking information about *Student*'s home school and prospective private school programs. Petitioners were informed that the interrogatories and requests for production of documents were continuing in nature and should be supplemented.

19. In response to interrogatories seeking the name of Petitioners' intended private school for *Student*, Petitioners served responses to the Board's discovery on February 23, 2008. After initially identifying a private school to which *Student* was denied admission, Petitioners stated that they intended to seek enrollment for *Student* at the Trilogy School. On June 18, 2008, counsel for Petitioners informed counsel for the Board that *Student*'s application at the Trilogy School was still pending.

20. On June 19, 2008, Petitioners informed the Respondent that *Student* had been denied admission to the Trilogy School. On that day, in a motions hearing before this tribunal on the Board's Motion for Summary Judgment, counsel for Petitioners stated that *Student*'s application to the Trilogy School was denied shortly after the previous hearing of May 19, 2008 and that *Student* had a current application pending at the Hill Center in Durham, North Carolina.

21. On April 1, 2008 the Board served a Second Request for Production of Documents, which explained in greater detail the nature of the home school records sought.

22. At the time of a motions hearing on May 19, 2008, Petitioners had not produced any work product from *Student*'s home school program. When asked at the hearing by the Undersigned what evidence she intended to put forth to show that the home school program was meeting the special education needs of *Student*, counsel for Petitioners indicated she would be calling *Student* as a witness to show the appropriateness of the home school program. and that she would be producing no other evidence regarding that issue. At this time, counsel for Petitioners did agree to make *Student*'s work product available for inspection and copying by the Board.

23. On May 22, 2008, Petitioners produced what was identified as *Student*'s home school records. Those records included the following: 1) a copy of a used Science textbook with a purchase sticker from The Homeschool Gathering Place dated April 11, 2008, with no work product; 2) a used copy of a Science teacher's education textbook with a purchase

sticker from The Homeschool Gathering Place dated April 2, 2008, with no work product; 3) a math teacher's edition and textbook with a purchase sticker from The Homeschool Gathering Place dated February 15, 2008, with no work product; 4) three consumable workbooks in the subjects of Science and Social Studies totaling 240 pages, with zero pages containing work product; 5) seven Math consumable workbooks totaling 685 pages, with one page appearing to have work-product; 6) ten consumable workbooks in the subjects of Reading/Language Arts totaling 892 pages, 866 of which were blank; 7) a pamphlet entitled *Meeting National Math Standards with Active Learning Strategies*, with no work product; and 8) one consumable workbook entitled *Ultimate Crosswords* and another entitled *Ultimate Family Puzzles Numbers*, neither of which contained any work product.

24. By Order filed June 13, 2008, Petitioners were ordered to fully comply with all outstanding discovery by June 17, 2008.

25. On May 8, 2008, Respondent filed a Supplement to Respondent's Motion for Sanctions, seeking sanctions against Petitioners for a number of letters against Respondent's key witnesses and expert witnesses at the hearing. At the time these letters were sent, the hearing was scheduled to begin in approximately three weeks.

26. In April 2008, Respondent identified *Dr. C.C.*, Professor and Director of the Diagnostic Teaching Clinic at North Carolina State University, as an expert witness and shared with Petitioners a letter written by *Dr. C.C.* in which (after review of *Student*'s records) she recommended a comprehensive evaluation for *Student*

27. In a letter dated April 7, 2008 but delivered on May 5, 2008, Petitioners directed a formal letter of complaint against *Dr. C.C.* to a colleague of *Dr. C.C.*'s, *Dr. R.T.*, an Associate Professor in the Counselor Education Program who has served as the Assistant Head for the Department. The letter was also forwarded to Dr *E.V.*, Head of the Department of Curriculum and Instruction and hand delivered to Dr. Kay Moore, Dean of the College of Education, and Dr. J.L.O., Chancellor of the University on May 5, 2008. Petitioners charged that "*Ms. C.C.* attempted to dance around making a professional diagnosis, one of which she is not qualified to make" and concluded by stating, "We find it necessary to make this formal complaint because a person in *Ms. C.C.*'s position has tremendous influence over students who one day might become school personnel. Passing on such inflammatory biased opinions is detrimental to the future teachers under her tutelage."

28. In addition to the letter against *Dr. C.C.*, Petitioners also filed four letters of complaint with Superintendent of the WCPSS *Superintendent D.B.*, and four additional letters of complaint with Chief Area Superintendent, Mr. Dan B. All 8 of these letters were written on April 7, 2008 and both Dr. Burns and Mr. Barnes received a letter directed against four critical witnesses: *Mr. P.N.*, special education teacher and *Student*'s case manager; *Ms. M.B.*, assistant principal and frequent member of *Student*'s IEP team; *Ms. E.H.*, principal of W.F. Middle Schools; and *Ms. S.W.*, Senior Administrator of Legal and Compliance, Exceptional Children's Services. In the closing paragraph of each letter,

Petitioners request that the Superintendent or Area Superintendent "conduct a thorough investigation of the matter" and respond within ten days. The complaint concludes with Petitioners' request "that a copy of this letter be placed" in the personnel files of those whom Petitioners have complained.

29. In addition, formal letters of complaint were also received by North Carolina State Board of Education Chairman Senator Howard N. Lee; State Superintendent of Instruction June St. Clair Atkinson; Secretary of Education Margaret Spellings, United States Department of Education; Chairman Joe Bryan and Commissioners Harold Webb and Betty Lou Ward, Wake County Commissioners; and Representative David Price, House of Representatives.

30. The nature of these complaints directed to higher level management and the timing (after witness depositions in this case and some six months after *Student* exited the Wake County Schools) gave the overwhelming appearance that such was an attempt to discourage full involvement in this matter by Respondent's witnesses. The Undersigned did not dismiss the case but imposed other sanctions as set forth in a June 16, 2008 Order.

31. The parties were directed to exchange stipulations, witness lists, and marked exhibits on or before June 18, 2008. Respondent was prepared to timely comply with this directive as evidenced by the Proposed Order on Final Pretrial Conference filed on June 18, 2008, detailing a list of 137 marked exhibits and 36 witnesses.

32. Counsel for Petitioners informed Respondent's Counsel on June 18 that she would not be producing any exhibits or a witness list because Petitioners would be presenting no exhibits at the hearing and would be calling no witnesses.

33. On June 19, 2008, a hearing on Respondent's Motion for Summary Judgment was held. At that hearing, though depositions were taken and Petitioners previously represented to this Tribunal that *Student* would be testifying, counsel for Petitioners informed the Undersigned that Petitioners would submit no evidence and call no witnesses at a hearing on the merits.

34. Petitioners' counsel represented that Petitioners were initially seeking educational assistance with their homeschool program in the form of a teacher and a resource officer. However, counsel for Petitioners stated that while this was an initial remedy sought by Petitioners, it was one that was no longer being requested of this Tribunal. These statements and this new direction for the contested case were incongruous with previous representations made by Petitioners throughout the duration of these proceedings up until this point.

35. During the June 19 hearing, counsel for Petitioners informed Respondent and the Undersigned that *Student* had been denied admission at the Trilogy School, and was now seeking admission at the Hill Center in Durham, N.C. Petitioners counsel acknowledged that Petitioners were not entitled to reimbursement for expenses that did not exist.

36. Petitioners have further represented that they do not intend to return *Student* to the Wake County School System, so any remedy related to *Student*'s IEP is foreclosed.

37. Counsel for Petitioners also represented at the June 19, 2008 hearing that the remaining issue in the case was whether the administrative transfer of *Student* by *Superintendent D.B.* violated *Student*'s right to FAPE. This representation is inconsistent with previous representations set forth throughout the course of this litigation, as well as the Amended Petition itself. Such single issue of law appears to be incongruent with all other matters in the record to this point.

38. At the time of the June 19, 2008 motions hearing, the hearing on the merits was scheduled to begin in four business days. Petitioners had filed no motion for summary judgment and had not filed any cross motion to Respondent's Motion for Summary Judgment.

39. Under the rules of the Office of Administrative Hearings, dispositive motions must be filed no later than 10 days prior to the start of the contested case hearing. 26 NCAC 03.0115.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over this matter and over the parties pursuant to N.C. Gen. Stat. §115C-109.6. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder. To the extent that the Findings of Fact contain conclusions of law, or that the Conclusions of Law are findings of fact, they should be so considered without regard to the given labels.

2. Petitioner has the burden of proof on a hearing on the merits in this case. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed. 2d 387 (2005). The responsible party for the burden of proof must carry that burden by a greater weight or preponderance of the evidence. Black's Law Dictionary cites that "preponderance means something more than weight; it denotes a superiority of weight, or outweighing." The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side.

3. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. 20 U.S.C. 1415(f)(3)(e). Although Petitioners cite a procedural violation by the Superintendent, by their failure to submit any evidence whatsoever, Petitioners fail in

their burden of proof that such alleged procedure violation impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate or caused a deprivation of educational benefit.

4. Further, in accord with *Painter v. Wake County Bd of Ed.*, 288 N.C. 165, 217 S.E.2d 650 (1975), absent evidence to the contrary, it will always be presumed that "public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. Every reasonable intendment will be made in support of the presumption." See also *Huntley v. Potter*, 255 N.C. 619, 122 S.E.2d 681 (1961). The burden is upon the party asserting the contrary to overcome the presumption by competent and substantial evidence. See *Styers v. Phillips*, 277 N.C. 460, 178 S.E.2d 583 (1971). Petitioners informed the Undersigned they would be presenting no oral or written evidence in their case in chief.

5. If a parent or guardian unilaterally removes a child from the local public school system, the parent or guardian may obtain reimbursement for an alternative placement only if able to demonstrate that the regular school placement was inappropriate and that the alternative placement was appropriate. *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 373-374 (1985). Petitioners cannot prove either prong of the *Burlington* test without presenting competent evidence. Petitioners' plan to introduce no evidence and call no witnesses demonstrates that their burden of proof neither could nor would be met at hearing.

6. Even had Petitioners been prepared to present competent evidence, Respondent nevertheless would remain entitled to summary judgment. As to Petitioners' claim for reimbursement of private school expenses, case law under the IDEA is well-settled that reimbursement is a "backward form of remedial relief." *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13 (1st Cir. 2006).

7. An alleged failure to provide FAPE in one academic year does not entitle parents to tuition reimbursement in subsequent years. *Yancey v. New Baltimore City Board of School Commissioners*, 24 F.Supp.2d 512, 514 (D. Md. 1998).

8. Petitioners cannot show that their hypothetical private school placement for *Student* is appropriate since no such placement yet exists. Furthermore, Petitioners have no reimbursable private school expenses since *Student* is not in fact attending a private school. Therefore, as a matter of law, Respondent is entitled to judgment as to Petitioners' claim for private school tuition for the 2008-2009 school year.

9. The Amended Petition, read in the light most favorable to Petitioners, recites no more than a three month violation of FAPE during the 2006-2007 and 2007-2008 school years. Even assuming that Petitioners could establish a violation of FAPE during the 2007-2008 school year, Petitioners are not entitled to private school tuition reimbursement in subsequent years. Therefore, as a matter of law, Respondent is entitled to judgment as to Petitioners' claims for private school tuition for the 2009-2010 school year and beyond.

10. The two-pronged *Burlington* test also applies to Petitioners' claim for reimbursement of home school expenses: Petitioners must show both that Respondent's placement was inappropriate and that their private placement was appropriate.

11. The records produced by Petitioners are insufficient as a matter of law to meet the second prong of the *Burlington* test. With decision to produce no evidence in this case, Petitioners cannot show that their private placement was appropriate. Therefore, even had Petitioners not withdrawn their request for home school reimbursement at the motions hearing on June 19, 2008, Respondent would have been entitled to judgment as a matter of law as to Petitioners claim for reimbursement of home school expenses.

12. The North Carolina General Assembly assigned responsibility for conducting special education due process hearings to the Office of Administrative Hearings (OAH). The OAH conducts those hearings arising out of the IDEA and State law in accordance with N.C.G.S. § 115C-109.6 *et seq.* and N.C.G.S. § 150B-23 *et. seq.* There is also in place a Memorandum of Understanding between the North Carolina State Board of Education, through the Department of Public Instruction, Exceptional Children Division and the North Carolina Office of Administrative Hearings.

13. "The IDEA specifically provides for two approaches to administrative challenges. A parent is entitled to "an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." 20 U.S.C. § 1415(f)(1)(A). If the state elects to allow the local educational agency to conduct the due process hearing, it must provide for an appeal to the state educational agency. *Id.* § 1415(g)(1). If the due process hearing is held by the state, no appeal is required." *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, 2006 WL 2568937 *1 (M.D.N.C.)

14. "North Carolina has adopted a modified two-tier system, in which both levels are conducted by the State." Therefore, in North Carolina, in which the hearing is conducted by the state and appealed to a state review official, the state review official's decision is considered the "official position of the state educational agency." *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, 2006 WL 2568937 *1 (M.D.N.C.)

15. A court must try to give meaning to all provisions of a statute and additionally to consider the intent of the legislature when creating the statute. *Wilkins v. North Carolina State University*, 178 N.C. App. 377, 379, 631 S.E.2d 221, 223 (2006). A court should not construe a statute in such a way that renders part of it meaningless. *Id.* at 380-81, 631 S.E.2d 224. Policy reasons for passing the statute as well as the history of the legislation are also helpful when interpreting. *Electric Supply Co. of Durham, Inc. v. Swain Electric Co., Inc.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294-95 (1991). In accord with N.C.G.S. § 150B-34, the administrative law judge shall make a decision that contains findings of fact and conclusions of law and return the decision to the agency for a decision. Harmonizing the provisions of § 150B with § 115C so as "not rendering any part of them

meaningless," and in light of the above cited case law, should a decision in special education matters be appealed to a state review officer (who renders the final official position of the state education agency), then N.C.G.S. § 150B-36 shall apply.

FINAL DECISION by SUMMARY JUDGMENT

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned allows Respondent's Motion for Summary Judgment.

NOTICE

In accordance with the Individuals with Disabilities Education Act (as amended by the Individuals with Disabilities Education Improvement Act of 2004) cited as the IDEA, and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights.

In accordance with Federal law, 20 U.S.C. § 1415(f), the parents involved in a complaint "shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." A decision made in a hearing conducted pursuant to (f) that does not have the right to an appeal under subsection (g) may bring civil action in State court or a district court of the United States. *See* 20 U.S.C. § 1415(i). In accordance with *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, 2006 WL 2568937 *1 (M.D.N.C.), if the due process hearing is held by the State, no appeal to the state educational agency is required."

In accordance with State law, N.C.G.S. §§ 115C-106.1 *et seq.*, and particularly N.C.G.S. § 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 . . may appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board under G.S. 115C-107.2(b)(9) to receive notices." The State Board, through the Exceptional Children Division, shall appoint a Review Officer who shall conduct an impartial review of the findings and decision appealed.

"North Carolina has adopted a modified two-tier system, in which both levels are conducted by the State." Neither IDEA nor the federal regulations contemplate a situation in which a hearing conducted by the state will be appealed to the state. Therefore, in North Carolina, in which the hearing is conducted by the state and appealed to the state, the state review official's decision is considered the "official position of the state educational agency." *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, 2006 WL 2568937 *1 (M.D.N.C.)

The decision of the review officer which is the final official state agency decision is limited to whether the evidence presented at the OAH hearing supports the findings of fact and conclusions of law and whether the conclusions of law are supported by and consistent with 20 USC § 1415, 34 CFR §§ 300 and 301; GS 115C; the Procedures; and case law. In accordance with N.C. Gen. Stat. § 150B-36 the decision of the Administrative Law Judge shall be adopted unless it is demonstrated that the decision of the Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record. The review officer must also consider any further evidence presented in the appeal process. In accordance with N.C. Gen. Stat. § 150B-36 each finding of fact contained in the Administrative Law Judge's decision shall be adopted unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the Administrative Law Judge to evaluate the credibility of witnesses. For each finding of fact not adopted, the reasons for not adopting the finding of fact and the evidence in the record relied upon shall be set forth separately and in detail. Every finding of fact not specifically rejected as required by Chapter 150B shall be deemed accepted for purposes of judicial review. For each new finding of fact that is not contained in the Administrative Law Judge's decision, the evidence in the record relied upon shall be set forth separately and in detail establishing that the new finding of fact is supported by a preponderance of the evidence in the official record.

Inquiries regarding further notices and time lines should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina.

IT IS SO ORDERED.

This the 28th day of August, 2008.

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Augustus B. Elkins II
Administrative Law Judge